

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LORI ANN WILLMON

Claimant

VS.

KELLY SERVICES, INC.

Respondent

AND

CONTINENTAL CASUALTY COMPANY

Insurance Carrier

Docket No. 196,199

NUNC PRO TUNC ORDER

Claimant appealed the Award of Administrative Law Judge Steven J. Howard dated May 30, 1996. The Appeals Board heard oral argument by telephone conference on October 17, 1996.

APPEARANCES

Claimant appeared by her attorney, Donald T. Taylor of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Gary R. Terrill of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and adopted the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

Claimant requested the Appeals Board to review the following issues:

- (1) Whether claimant suffered an accidental injury that arose out of and in the course of her employment with the respondent.
- (2) Whether the provisions of S.B. 649 amending K.S.A. 44-501(c) should be applied retroactively.
- (3) The correct amount of claimant's average weekly wage.

Respondent limited additional issues for Appeals Board review at oral argument to the following:

- (4) Whether claimant failed to provide timely notice of accident to respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The Administrative Law Judge denied claimant workers compensation benefits, finding claimant failed to prove she sustained an accidental injury that arose out of and in the course of her employment with the respondent. The Appeals Board agrees claimant is not entitled to workers compensation benefits. However, the Appeals Board finds that the requested benefits should be denied because of claimant's failure to provide respondent with timely notice instead of failure to prove that she suffered an accidental injury.

Claimant alleged she injured her back while employed by the respondent and assigned to work at National Service Center on November 1, 1994. Claimant testified that her job required her to unload 20-pound boxes of hot dogs from the skid. While performing that work activity, claimant testified that she felt something pull in her back. Claimant also established through her testimony that she initially was not feeling well because of a problem with her blood sugar level. Claimant left the job with National Service Center after working only three hours. Later in the evening, while claimant was at home, claimant testified her back started to bother her. The next day claimant telephoned respondent and notified a representative of the respondent she was not able to work because her back hurt and, further, she was having some problem with her blood sugar level. Claimant was asked specifically at the regular hearing whether she told the representative of the respondent whom she talked to on November 2, 1994, that she hurt her back the previous day while working at National Service Center. In response to the question, claimant answered in the negative.

The next time claimant contacted the respondent was on November 14, 1994, and at that time she requested medical treatment for her back. Claimant testified the reason she waited two weeks before contacting respondent to request medical treatment was she thought that her back would improve. The physician to whom respondent referred claimant for medical treatment prescribed physical therapy. Claimant received four physical therapy treatments. She was then released for regular work by the respondent's treating physician on November 28, 1994.

Claimant testified that she worked for another employer, LaHood Insurance Company, for a week after she injured her back working for the respondent, starting approximately November 14, 1994, and continuing through the week that she received physical therapy treatments from November 17 through November 23, 1994. Claimant's job duties consisted of sorting paper and filing.

Pam Wallace, a supervisor employed by the respondent, testified by deposition on April 8, 1996. Ms. Wallace was claimant's supervisor when claimant worked in November 1994. Ms. Wallace testified that she received a telephone call from the claimant at 6:55 a.m. on November 2, 1994. According to Ms. Wallace claimant called and stated "The work is too hard for her, and she is having problems with her blood sugar level." Ms. Wallace further testified claimant did not state during this conversation that she injured her back while working at National Service Center. Ms. Wallace established that the respondent was not contacted by the claimant again until November 14, 1994, when claimant called and talked to Ms. Wallace and requested medical treatment for an injured back.

For accidents occurring after July 1, 1993, the notice statute in the Kansas Workers Compensation Act makes it a strict requirement that the employer be given notice of accident within ten days unless the existence of just cause for not doing so can be established by the claimant. If just cause is established, then the employee has 75 days from the date of accident to provide notice. See K.S.A. 44-520.

Claimant admitted during her testimony she did not notify the respondent on November 2, 1994, the day after her alleged accident, that she injured her back while working at National Service Center. The Appeals Board, therefore, finds claimant did not give notice of accident to the respondent until November 14, 1994, which is outside the ten days required by K.S.A. 44-520. Nevertheless, claimant further argued she had just cause for not giving notice within ten days as she thought that her back was going to improve. The claimant presented no other evidence on the issue of just cause. The Appeals Board concludes this evidence alone is not persuasive to establish just cause. Claimant testified her back became symptomatic the evening of November 1, 1994, the day of her accident. Claimant further testified her back was so bad the next day she could hardly get out of bed. The Appeals Board finds from the nature of the onset of claimant's back condition and the severe intensity of her symptoms that claimant should have notified the respondent of the need for medical treatment because of the work-related accident prior to November 14,

1994. Therefore, claimant has failed to establish just cause of her failure to notify the respondent of the accident within ten days. Accordingly, the Appeals Board finds claimant failed to give notice of accident as required.

All other issues raised by the parties for Appeals Board review need not be addressed as those issues are rendered moot due to the above finding.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated May 30, 1996, that denied claimant workers compensation benefits is affirmed for the reason claimant failed to give timely notice of accident to the respondent as required by K.S.A. 44-520.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Donald T. Taylor, Kansas City, KS
Gary R. Terrill, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director